Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-663

In The

Supreme Court of the United States

October Term, 1987

GERALD GREENWALD, M.D.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The respondents submit that the question presented for review would be more accurately stated as:

Whether petitioner was denied due process and equal protection of law when the Florida Board of Medicine revoked his license to practice medicine for violation of section 458.331(1)(c), Florida Statutes, without having established disciplinary guidelines required by statute for the disposition of disciplinary cases.

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ISSUE

The respondent, Florida Department of Professional Regulation, Board of Medicine respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Third District Court of Appeal of the State of Florida. That opinion is reported at 501 So.2d 740 (Fla. 3d DCA 1987).

STATEMENT OF THE CASE

The respondent accepts the statement of the case presented by the petitioner.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The federal constitutional questions were not addressed by the state court.

As petitioner correctly states, the decision of the district court of appeal does not address any federal constitutional issue, but rather, only construes the language of section 458.331(1)(c), Florida Statutes. No federal or state constitutional provision is mentioned. When a state court decision fails to expressly pass on a federal question, it is presumed that the omission was due to a failure to properly present the federal question in the state courts. *Street v. New York,* 394 U.S. 576 at 582 (1969).

2. There is no conflict among the Circuit courts concerning the issue raised by petitioner.

There is not conflict among the United States Circuit Courts of Appeal concerning the issue which petitioner raises; even if such conflict exists, this case is not the appropriate vehicle for review of that conflict. In *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983), the court held that the fact that the Lebanon Planning Board exceeded its review power in denying a building permit did not constitute an infringement of constitutional rights. Any failure to establish standards was not an issue in that case; therefore no conflict exists with the other cases by petitioner.

Nor does the present case conflict with the other cases so cited. In *Southern Cooperative Development Fund v. Driggers,* 696 F.2d 1347 (11th Cir. 1983), the court held that inasmuch as the applicable statutes did not grant the county commission additional discretion to deny a plat permit once specified requirements had been met, denial was a violation of due process. *Hornsby v. Allen,* 326 F. 2d 605, 612 (5th Cir. 1964), deals with the failure to establish standards for the granting or denial of a license, and *Holmes v. New York City Licensing Authority,* 398 F.2d 262, 265 (2d Cir. 1968) deals with a similar issue. In the present case, however, standards for the issuance of a license are not applicable. The standards that are the basis of petitioner's claim are the sentencing guidelines to be applied in determining the penalty to be imposed in a professional license disciplinary proceeding; guidelines that would only come into play following a finding that the physician had violated the provisions of the Medical Practice Act. Further, there is no doubt that the pen-

alty imposed here, revocation, would remain within the discretion of the Florida Board of Medicine for a violation of section 458.331(1)(c), Florida Statutes, pursuant to section 458.331(2), Florida Statutes, with or without the sentencing guidelines. Thus it is clear no conflict exists, and review should be denied.

CONCLUSION

Because no federal constitutional issue was addressed by the appropriate state court, and the questions raised present no conflict with decisions of other federal courts of appeals on the same subject matter, and no important questions of federal law which have not been but should be settled by this Court, respondents respectfully request that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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